

As regards costs, the learned judge made an order for a separate set of costs out of the estate for each of the parties. In my opinion that order needs to be varied to some extent because several different orders become necessary where there are a number of parties to whom different considerations apply. There can be no doubt that the plaintiffs are entitled to their solicitor and client costs out of the estate both in the court below and here. The interest of the third defendant being divergent from the interests of the other parties, she was entitled to separate representation and is therefore entitled to costs out of the estate in the court below and here. The first intervener was the principal party arguing in favour of the validity of the three documents and having succeeded, he is similarly entitled to costs out of the estate. The second intervener is also entitled to costs out of the estate as she supported the first intervener and their interests are divergent. As the first defendant and the third and fourth interveners had reasonable grounds for opposing the will, they must get their costs out of the estate, but as there was no divergence in their interests there should be an order for only one set of costs for them in the court below and here. The second defendant, being the third executrix named in the will, took no part in the proceedings and did not ask for costs. So no order should have been made in respect of her costs. I would therefore vary the learned judge's order of costs accordingly.

Ong Hock Sim and Raja Azlan Shah F.JJ. concurred.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Cheang Lee & Ong; Lewis & Co.; Lim Kean Chye & Co.; Yeoh Kian Teik & Co.*

GOVERNMENT OF MALAYSIA v. MAHAN SINGH

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) May 3, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 63 of 1974]

Administrative Law — Termination of service of member of public service — Permanent officer — Officer holding office at pleasure of Yang Dipertuan Agung — Whether officer has right to be heard — Emergency Regulation — Delegation of powers of Yang Dipertuan Agung — Public Officers Regulation (Conduct and Discipline) (General Orders Cap. D) 1969 — Pensions Ordinance, 1951, s. 5 — Federal Constitution, arts. 132(2A), 135(2).

Constitutional Law — Termination of service — Federal Constitution, arts. 132 & 135.

The respondent was an officer on the permanent establishment. As a result of a report made by the officer's head of department, his services were terminated by the Director of Operations under regulation 44 of the General Orders Cap. D. The respondent brought an action against the Government for a declaration that the termination of his service was void. In the High Court the learned judge gave judgment in favour of the respondent. The appellants appealed. The main issue on the appeal was whether the purported termination of the respondent's service by the Government was lawful.

Held, allowing the appeal: (1) a pensionable officer has no right, lien, or title to his post and all Federal public officers hold office at the pleasure of the Yang Dipertuan Agung;

(2) Regulation 44 of General Orders (Cap. D) is not inconsistent with the Federal Constitution and is therefore valid;

A (3) the Government had power to terminate the respondent's service in the public interest under the regulation and as Government's decision to do so did not involve punishing or penalising the respondent, he had not been dismissed and therefore was not entitled to a reasonable opportunity of being heard under Article 135(2) of the Federal Constitution.

Cases referred to:-

- B** (1) *Haji Ariffin v. Government of State of Pahang* [1969] 1 M.L.J. 6.
- (2) *Gnana Sundram v. Public Services Commission* [1966] 1 M.L.J. 157.
- (3) *Government of Malaysia v. Lionel* [1974] 1 M.L.J. 3.
- (4) *S.K. Pillai v. State of Kedah* 6 F.M.S.L.R. 160, 170.
- (5) *Amalgamated Union of Public Employees v. Permanent Secretary (Health)* [1965] 2 M.L.J. 210.
- (6) *Moti Ram v. N.E. Frontier Railway A.I.R.* 1964 S.C. 600.
- C** (7) *Munusamy v. Public Services Commission* [1967] 1 M.L.J. 199.
- (8) *State of U.P. v. Shyam Lal A.I.R.* 1971 S.C. 2151.
- (9) *Eng Keock Cheng v. Public Prosecutor* [1966] 1 M.L.J. 18, 20.
- (10) *Munusamy v. Public Services Commission* [1964] M.L.J. 239, 243.
- D** (11) *Dhingra v. Union of India* [1958] S.C.R. 828; A.I.R. 1958 S.C. 36.
- (12) *Local Government Board v. Arlidge* [1915] A.C. 120.
- (13) *Ridge v. Baldwin* [1964] A.C. 40.
- (14) *Maxwell v. Department of Trade and Industry* [1974] Q.B. 523.
- (15) *Salpetre's Case* (1602) 12 Co. Rep. 12.
- (16) *Ronnfeldt v. Phillips & Ors.* (1918) 35 T.L.R. 47.
- E** (17) *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508.
- (18) *Shiponmey's Case, R. v. Hampden* 3 St. Tr. 825.
- (19) *Re an Arbitration between Shipton Anderson & Co. and Harrison Brothers & Co.* [1915] 3 K.B. 676.
- (20) *Thambipillai v. Government of Malaysia* [1967] 2 M.L.J. 206, 208.
- F** (21) *Terrell v. Secretary of State for the Colonies* [1953] 2 Q.B. 482, 495, 500.

FEDERAL COURT.

Abu Talib bin Othman (Senior Federal Counsel) (*Lim Beng Choon*, Federal Counsel with him) for the appellant.

G *M. Sivalingam* for the respondent.

Suffian L.P. (read by **Ong Hock Sim F.J.**): The plaintiff joined Government service on February 15, 1947, as a Clerk and Punjabi Interpreter. On October 1, 1949, he was put on the permanent establishment. He served as Registrar of the Sessions Court from April 1, 1961, to November 30, 1969. On December 1, 1969, he was transferred to the office of the Special Commissioners of Income Tax at Kuala Lumpur.

While he was working with the Special Commissioners of Income Tax, a report dated January 3, 1970, on his conduct and work was received by the Director of Public Services Department from the Secretary to the Ministry of Justice under regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Cap. D) Regulations, 1969, published on July 29, 1969, as P.U. (A) 273, hereinafter referred to as Cap D. That report is privileged under section 123 of the Evidence Act and no copy was ever supplied to the plaintiff. The Secretary to the Ministry of Justice was the head of the department in which the plaintiff had

served immediately prior to his transfer to the Special Commissioners of Income Tax.

The report was referred to the Director of Operations, who agreed to the termination of the plaintiff's service under regulation 44 of Cap D.

On March 20, 1970, when the head of the plaintiff's department was the Chairman of the Special Commissioners of Income Tax, a letter (Exhibit A7 at page 157 of the Appeal Record) was written by the Director of the Public Services Department to the plaintiff informing him that his service would be terminated under regulation 44 of Cap D as soon as he had taken all the leave for which he was eligible and that his pension will be worked out according to the Pensions Ordinance, 1951. An English translation of that letter reads:

"JPA. SULIT NP/7046/SJ. 13/13

Public Services Commission,
Malaysia,
Rumah Persekutuan,
Jalan Sultan Hishamuddin,
Kuala Lumpur.
20th March, 1970.

(Promotion and Discipline Section)

Sir,

I have been directed to inform you that in the exercise of the power conferred under section 10(d) of the Pensions Ordinance, 1951, the Government has decided to pension you off in the public interest. According to Regulation 44 of the Public Officers Regulations (Conduct and Discipline) (General Orders, Cap. 'D') 1969 your service will be terminated as soon as you have taken all the leave for which you are eligible. Your eligibility for pension will be worked out according to the Pensions Ordinance, 1951.

Yours obediently,

Sgd. (Tan Sri Syed Zahiruddin b. Syed Hassan)
Director of Public Services,
Malaysia.

Enche Mahan, Singh,
Office of the Special Commissioner,
Income Tax,
Kuala Lumpur."

It should be noted that the plaintiff was born on May 27, 1921, and was not yet 49 when he received A7. Normally under the Pensions Ordinance he could have worked until the age of 55 when he would have retired with a bigger pension. He wanted to work until age of 55. So he appealed to the Director of Public Services, Malaysia. A translation of his appeal is as follows:—

“(Confidential)

Mahan Singh,
Setiausaha,
Pejabat Pesuruhjaya Khas
Chukai Pendapatan,
Bangunan Sharikat Polis.
3rd April 1970.

The Chief Registrar,
High Court Registry,
The Law Courts,
Kuala Lumpur.
Through:
Chairman,
Special Commissioners Income Tax,
Kuala Lumpur.

Sir,

I have the honour to forward herewith a copy of the letter JPA. Sulit NP/7046/SJ. 13/13 dated 20th March, 1970 from the Director of Public Services, Malaysia which was received on 31st March, 1970 for your views. I shall be grateful if you will forward my grounds of appeal to the Director of Public Services, Malaysia:

A (a) I was taken by surprise in receiving this letter. I do not know at all that something was going on behind my back. I was not given any opportunity to explain and to clear myself from any allegation against me.

(b) I have been in the Government Service for 23 years honestly and diligently, even up to this very moment my annual confidential reports from various Presidents of the Sessions Court can be referred to.

B (c) I have 9 children (4 by my 1st wife who had passed away) and 5 by my present wife. In February last year my eldest son left for United Kingdom to study law and I am the sole supporter of all my children, who are still schooling in various schools in Ipoh.

(d) I wish to state also that I am unlucky as my present wife is sickly and had been attending the mental clinic since 1962.

C (e) As far as I can remember I have not committed any offence and offended anybody during my service. During my term of office as Registrar, Sessions Court, I performed my duty straight forward and impartial. I believe that a certain person held a grudge against me and started making false report.

(f) I will be attaining the age of 49 in June 1970. I intend to bring up my family properly. I have just reached the maximum salary of my appointment.

D (g) I was thinking that when I am old my financial problem will be lessened. I came to my position as it is now by working hard and diligently. On receiving this letter asking me to retire make all my plans shattered away.

On the ground stated above I appeal to you to reconsider and to allow me to carry on working until such time when my eldest son returns from United Kingdom after being qualified in his law study. He is depending solely on me and after that I will voluntarily retire. At present it is difficult for me to get loan from my relatives or friends.

E Thank you.

I have the honour to be,
Sir,
Yours obediently,
Sgd. Mahan Singh."

There was no change in the decision of Government.

F A few months later the Secretary, Ministry of Justice, received a letter A20 dated July 29, 1970, from the Director of Public Services, informing him that the Yang Dipertuan Agung had approved the grant of pension benefits to the plaintiff but subject to a deduction of 10% as if he had retired on the ground of his health. A translation of that letter reads as follows:—

G "JPA Sulit. 7046/SJ/13/20
The Secretary,
Ministry of Justice,
Kuala Lumpur.

29th July, 1970.

Sir,

*Pensioned off in the Public Interest
Enche Mahan Singh, Senior Registrar,
Sessions Court*

H I am directed to refer to your letter KK/Sulit/O.169/20 dated 3rd January, 1970 about the above subject and to inform you that Duli Yang Maha Mulia Seri Paduka Baginda Yang Dipertuan Agung has graciously approved the pension benefits be granted to Enche Mahan Singh, Senior Registrar, Sessions Court of which he is eligible to receive as if he is to be pensioned off on the ground of his health with deduction of 10% of the pension benefit.

I According to the decision of para. 1 above you may now take action and arrange for the payment of the pension benefit to the above-mentioned officer.

Yours obediently,
Sgd. (Mohd. Affendy bin Hanafiah)
for Director of Public Services,
Malaysia."

On December 29, 1971, the plaintiff brought a suit in the High Court at Ipoh against the Government.

In his Statement of Claim he complains that he was condemned unheard, that he was not given an opportunity to defend himself nor told why his service had been terminated. He contends that regulation 44 is null and void and *ultra vires* the provisions of Ordinance No. 1 of 1969 and article 150 of the Constitution.

He asks for a declaration that —

- (1) the letter of March 20, 1970 (exhibit A7) was void as it failed to comply with section 10(d) of the Pensions Ordinance and with regulation 44 of Cap D;
- (2) if that letter is valid, it was an attempt to circumvent article 135(2) of the Constitution and is void because of non-compliance with that article; and
- (3) the termination of his service was void because of non-compliance with the rules of natural justice.

He claims ancillary relief.

The defendant maintains that the plaintiff was not dismissed within the meaning of article 135(2) of the Constitution, that his service was merely terminated in accordance with regulation 44, that he was lawfully retired under section 10(d) of the Pensions Ordinance 1951 and that it was therefore not necessary to give the plaintiff a reasonable opportunity of being heard before his service was terminated.

The defendant denies that regulation 44 was *ultra vires* the provisions of Ordinance No. 1 of 1969 and article 150 of the Constitution.

Finally the defendant contends that the plaintiff's action, not having been commenced within 12 months from the termination of his service, is time-barred by section 2(a) of the Public Authorities Protection Ordinance, 1948. This defence was abandoned at the commencement of the trial.

Hearing of the plaintiff's claim began on September 18, 1973. It went on for 6 days. The evidence itself was short and most of the time of the court was taken up by arguments on the law.

On May 3, 1974, the learned trial judge gave judgment in favour of the plaintiff.

The Government appeals to us.

The main issue in this appeal is whether the purported termination of the plaintiff's service by the Government in these circumstances was lawful.

As regards the first declaration sought by the plaintiff, namely that the letter A7 was void as it failed to comply with section 10(d) of the Pensions Ordinance and with regulation 44 of Cap D, section 10 of the Ordinance reads:

"10. It shall be lawful for the Yang Dipertuan Agung in the case of a Federal officer [which the plaintiff was] . . . to require any officer to retire from the public service in the Federation —

- (a) who, in the case of a male officer in the public service in the Federation at the commencement of this Ordinance, has attained the age of fifty-five years, and in any other case has attained the age of fifty years if a man or forty-five years if a woman; or

- A (b) who, being a police officer below the rank of Assistant Superintendent, prison officer below the rank of Superintendent, or a male nurse at a Government mental hospital, has attained the age of forty-five years; or
- (c) who appears to the Yang Dipertuan Agung or the Ruler, as the case may be, to be incapable, by reason of some infirmity of mind or body likely to be permanent, of discharging the duties of his office; or
- B (d) on the termination of his employment in the public interest; or
- (e) who, being a woman, is married or marries; or
- (f) on the abolition of his office; or
- (g) for the purpose of facilitating improvement in the organisation of the department to which he belongs by which greater efficiency or economy may be effected; or
- (h) on the ground of national interest."

C The Yang Dipertuan Agung may by law delegate any of his functions under that section, but it is admitted that he has not delegated his power under paragraph (d).

Regulation 44 of Cap D reads:

D "4. (1) Notwithstanding these General Orders, where it is represented to or is found by the Government that it is desirable that any officer should be required to retire from the public service in the public interest or on grounds which cannot suitably be dealt with by the procedure laid down in these General Orders, the Government may call for a full report from the Head of Department in which the officer is serving. The said report shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.

E (2) Where the Government considers that it requires further clarification, it may cause to be communicated to the officer the complaints by reason of which the termination of his service is contemplated.

(3) If after considering the report or (in the case of the Government having communicated to the officer as in paragraph (2)) after giving the officer an opportunity of submitting a reply to the complaints the Government is satisfied that having regard to the conditions of the services, the usefulness of the officer thereto, the work and conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the officer with effect from such date as the Government shall specify.

F (4) Where the Disciplinary Authority has recommended to the Government that an officer should be required to retire from the public service in the public interest, the Government may so terminate the service of the said officer.

G (5) In every case of such termination of service of an officer under this General Order, the question of pension shall be dealt with in accordance with the law relating to pensions."

H It is argued on behalf of the plaintiff first that under section 10(d) of the Pensions Ordinance only the Yang Dipertuan Agung has power to terminate the plaintiff's service in the public interest, whereas the letter A7 stated that it was the Government that had decided to so retire him; and secondly that under regulation 44, Cap D, the Government must be satisfied that it was desirable to terminate the plaintiff's service in the public interest when so terminating it, whereas the letter merely stated that his service would be so terminated without saying that Government had been satisfied that it was desirable to so terminate his service.

I With all due respect I do not think that there is anything in this point. First, it is quite clear that at the material time there were two concurrent authorities with power to terminate a public officer's service in the public interest:

(a) the Yang Dipertuan Agung under section 10(d) of the Pensions Ordinance; and

(b) the Government under regulation 44, Cap D. The letter A7 shows quite clearly that in this case the decision to terminate the plaintiff's service in the public interest was taken by Government which also had power to do so. The reference in it to the Yang Dipertuan Agung is merely to indicate that the plaintiff, despite the termination of his service, would get a pension under the Ordinance.

Secondly, I agree that that letter might have been more happily worded, but nevertheless I am of the opinion that it should be read as a whole, and I hold that when read as a whole it plainly did two things:

- (a) it notified the plaintiff that Government had decided to terminate his service; and
- (b) that his pension would be worked out in accordance with the Pensions Ordinance.

As regards (a), I do not think that the notification invalidated the decision because the letter plainly implied that Government must have been satisfied that it was desirable to so terminate the plaintiff's service in the public interest: otherwise Government would not have so decided. As regards (b), though A7 nowhere mentioned the Yang Dipertuan Agung, letter A20 certainly did, and when the two letters are read together as they should be, then it is clear that it was a decision of the Yang Dipertuan Agung also that his service be terminated in the public interest: otherwise, he would not have got any pension at all. The use of the word "retire" in section 10 is to enable officers required to retire under that section to be paid a pension. The scheme of the pension laws is such that the word "retire" is used in contrast to the words "resign", "dismiss" and so on, for it is only officers who retire who are paid a pension, not officers who resign, are dismissed, and so on.

As regards the second and third declarations sought by the plaintiff, namely that if letter A7 did comply with section 10(d) of the Pensions Ordinance and regulation 44 of Cap D, nevertheless it was void as it contravened article 135(2) of the Constitution and the plaintiff had been dismissed without having been given a reasonable opportunity of being heard, clause (2) of article 135 reads:

"(2) No member of such a service as aforesaid [which the plaintiff was] shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

Briefly the argument on behalf of the plaintiff on this point may be summarised as follows. The Malaysian cases decided so far on the meaning of the word "dismissed", such as *Haji Ariffin*,⁽¹⁾ *Gnanasundaram*⁽²⁾ and *Lionel*,⁽³⁾ involved temporary or contract officers who were not on the pensionable establishment; the plaintiff on the contrary was on the pensionable establishment and, being a permanent officer, he had a right to his post; when his service was terminated he was deprived of a right, and this deprivation amounted to a punishment; as a punishment was involved, he should have been given a reasonable opportunity of being heard as required by article 135(2); and as he was never given that opportunity, his dismissal was therefore void.

A It is true that our courts have not so far decided the question whether the termination of the service of a pensionable officer is or is not dismissal within the scope of article 135(2), but with all due respect I do not think that in Malaysia a pensionable officer has a right to his post, unlike the position in India where there are many Supreme Court decisions to the contrary, saying that a pensionable officer has a right, a lien, even title to his post equivalent to property. Passages from some of these decisions to that effect have been reproduced in the learned trial judge's judgment, and there is no need for me to reproduce them.

With all due respect I think that the law here is as stated by me at page 16 in *Haji Ariffin's* case, *supra* —

C "In India 'semi-permanent service' and 'permanent service' are defined by the Indian General Orders — as it would appear from the Indian law reports — and a semi-permanent or permanent officer has a 'right' to his post. I think that is what is meant by the expression 'it has ripened to a semi-permanent post' which occurs in *Dhingra's* case A.I.R. 1958 S.C. 36 in paragraphs 12 and 26. I do not know what is meant by a right, but if it exists it must flow from the Indian service rules which I regret I have not seen, because the Indian Constitution does not say that the ordinary public officer has a right to any post in the Indian public service."

D Here in Malaysia there is no such thing as permanent service, though the expression is much used by Government servants — there is no such thing as permanent service because every member of the public service (other than judges and the auditor-general) holds office during the pleasure of the State. This was so before independence (see *Terrell's* case [1953] 2 Q.B. 482 and section 5 of the Pensions Ordinance which explicitly says that Government has the right to dismiss a public officer without paying compensation). Terrell was told before he became a judge in the then Straits Settlements that the compulsory retiring age for a judge was 62. He was compulsorily retired before that age and sued the Secretary of State. Lord Goddard C.J. said at page 500 that Terrell could not argue (as he did) that he had a contractual right to remain in the service till that age, because such an argument would in effect override all the cases which decided that a servant of the Crown held office at pleasure. This selfsame argument had been put forward in *Shenton v. Smith* [1895] A.C. 229 and rejected by the Privy Council."

Before independence the legal position of public servants *vis-a-vis* the Ruler of Kedah was considered by the Kedah Court of Appeal as early as in 1927 in *S. K. Pillai v. State of Kedah*.⁽⁴⁾ There the plaintiff, a minor P.W.D. official, had been placed on the "fixed" establishment on December 23, 1922. The State engineer was not quite happy with the plaintiff's work, and also the plaintiff got embroiled in squabbles relating to the administration of a new Hindu temple at Sungei Patani; and there was correspondence between the plaintiff and the P.W.D. Then on December 7, 1925, the plaintiff was dismissed by the State Government. He sued the State Government for damages for wrongful dismissal. He lost before Dinsmore J. and again in the Kedah Court of Appeal, which held that a public servant in Kedah like a public servant in the F.M.S. and the Straits Settlements held office at pleasure only and by the terms of his engagement had no legal right as against the Crown to continuity of employment, promotion or pension. In the Court of Appeal Sproule J., proceeding on the basis that the plaintiff was on the pensionable establishment, said at pages 165-6:

"It seems to me, however, both upon reasoning and authority, that the power to dismiss a public servant of the Colony at will does not depend upon the prerogative at all, but upon

rules of contract and of public policy. The Privy Council explicitly so held in the case of *Shenton v. Smith* [1895] A.C. 229 at p. 234, where it is stated that their Lordships consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service.

It comes to this, then, that a contract of service with the Crown is to be construed as containing an implied term, well known to all public servants, that they hold [office] at pleasure only. That rule of construction is so well settled that no authority acting under or representing the Crown itself, has any power to exclude or depart from it. See *Dunn v. The Queen* [1896] 1 Q.B. at p. 118, *per* Lord Esther, M.R.; *Gould v. Stewart* [1896] A.C. at p. 577; and *Grant v. Secretary of State for India* L.R. 2 C.P.D., 445.

This rule is based not upon the prerogative, but rather on public policy. Such employment being for the good of the public, must not continue when it is no longer for the public good. It is essential for the public good that the Crown should not be hampered in dismissing a servant whose continuance in office it deems to be detrimental to the best interests of the State and its good government, by any fear of suits in reprisal (*Dunn v. The Queen* at p. 120; *Shenton v. Smith* at p. 235). Such continuance in office may, indeed, be a danger to the Commonwealth (*per* Kay, L.J., in *Dunn v. The Queen*).

I think it is clearly our duty, in the absence of any statute or custom, to apply in Kedah this fundamental rule of public policy and good government. We must hold that into all contracts of service under the State must be read an implied term, well known to all public servants, that they hold office only during pleasure and are dismissible at will, without any right or recourse to suit for salary or pension or for damages for wrongful dismissal."

In the next paragraph the learned judge added:

"...just as no authority under the Crown has power to restrict or dispense with the rule, so no regulations or general orders lacking the force of statute can avail to create any such dispensation."

Stevens J. was quite emphatic that the plaintiff had no legal right as against the Crown to continuity of employment, promotion or pension. He said at page 169-171:

"The trial judge has based his judgment on the view that the well-known principle that servants in the employment of the British Crown hold their appointments at the pleasure of the Crown should be imported (if I may use the term) into this State, and made applicable to the relations of the Sultan of Kedah with the servants of his Government. He supports this view by reference to a number of cases in which judges of the Federated Malay States have thought fit to apply principles of English law to the matters before them, and by the consideration that the adoption of the principles referred to will be in the public interests of the State. I am disposed rather to hold that the question for determination must be — what is *in fact* the existing relation between the Sultan and his servants — and that this question cannot be determined by assuming that a condition applicable to service under the British Crown is applicable to service under the Sultan of Kedah, *prima facie* the constitutional law of Great Britain, which is peculiar to Great Britain, is wholly unadaptable to the widely different institutions of a Malay State.

It is necessary to consider what is the nature of the contract (if it can be so called) entered into between a public servant and the British Crown. Now a public servant on accepting an appointment under the British Crown is in general appointed for no defined period. The Crown does not bind itself either to retain his services or to grant him increased pay or promotion. But it is the custom to bring to his notice that he may expect, if he remains in the service, promotion to higher grades accompanied by increased emoluments, and ultimately on retirement (at an age that is not infrequently specified) a pension to be enjoyed for the remainder of his life. Such an arrangement is not a binding contract of service such as is usually made between a private employer and

his servant. It confers no rights on the servant, but rather offers him an expectation of reward if his services are found to be satisfactory; and the inducement to the servant to embrace such a career lies not in any contractual rights acquired, but in the circumstances that it is in the public interest that public servants should look forward with confidence to the fulfilment of the expectations held out, and that for the most part those expectations are in fact fulfilled. In practice it is well-known that the service of the Crown is accompanied by a greater degree of security of tenure than almost any other employment.

Now the appellant in this case is a member of one of the subordinate branches of the State service, and the conditions of his employment appear to me to be closely parallel to those applying to similar appointments in the Federated Malay States and the Colony of the Straits Settlements. In this State, as in the Colony and the Federated Malay States, it is the custom to publish by order of the executive, what are called 'schemes' setting out the appointments open to servants of the department concerned, the salary payable to the holders of those appointments, and the conditions governing promotion to higher appointments. Officers whom the Government select as fit for permanent employment are invited to take their places on what is called the permanent establishment, which embraces appointments generally made pensionable, by which is meant that the holders of such appointments become entitled on retiring from the service to expect a pension on a definite scale laid down by statute.

But it is to be noted that no right to a pension is conferred. The Pensions Enactments definitely so provide, and the prospect of a pension is on precisely the same footing as the prospect of continued employment or that of promotion. Apart therefore from all considerations of law, it is apparent that such an arrangement as I have outlined does not confer on public servants a legal right as against the Crown to continuity of employment, promotion or pension. This proposition is so securely established that it is needless to cite any authority for it.

Now the employment of the appellant being apparently on the terms above described, it appears to me that, quite apart from constitutional principles, he has in fact acquired no contractual right to remain longer in the service of the State than the State chooses. His position would appear to be precisely similar to that of public officers in the service of the other Governments above referred to."

Such being the legal position of public servants as against the Crown before independence, to say that after independence they have on being placed on the pensionable establishment a right, a lien or a title to their job is to say that since independence there has been a radical change in the law. I would have expected our constitution-makers to use the clearest of language if they had intended to make such a radical change, but what do we find? We find that clause (1) of article 176 provides that pre-merdeka officers such as the plaintiff shall after Merdeka Day serve on the same terms and conditions as were applicable to them immediately before Merdeka. It reads:

"Subject to the provisions of this Constitution and any existing law, all persons serving in connection with the affairs of the Federation immediately before Merdeka Day shall continue to have the same powers and to exercise the same functions on Merdeka Day on the same terms and conditions as were applicable to them immediately before that day."

Then to remove any doubt, in 1960 clause (2A) was added to article 132 reading as follows:

"(2A). Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (e), (f) and (h) of Clause (1) [such as the plaintiff] holds office during the pleasure of the Yang Dipertuan Agung and, except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Governor."

In my judgment it is plain from all this that the pre-Merdeka law as expounded by *Pillai's* case⁽⁴⁾ still applies after Merdeka Day, so that a public servant today has no legal right as against the Crown to continuity of employment, promotion or pension.

As regards pension, subsection (1) of section 5 of the Pensions Ordinance No. 1 of 1951 which is still in force expressly provides:

"5. (1) No officer shall have an absolute right to compensation for past services or to any pension, gratuity or other allowance under this Ordinance, nor shall anything in this Ordinance contained limit the right of the Federal Government or, as the case may be, of the Government of any State or Settlement to dismiss any officer without compensation."

I find support for my view in a Singapore case, *the Amalgamated Union of Public Employees v. Permanent Secretary (Health)*⁽⁵⁾ where Winslow J. said at page 212:

"It is no doubt true that article 135 of the Federal constitution confers certain rights on civil servants but these relate to matters such as the manner in which or by whom they may be dismissed. They do not confer any right to office or to pension or any right not to be dismissed."

In view of the above, I would with all due respect to learned counsel for the plaintiff hold on to the view which I expressed in *Ariffin*⁽¹⁾ which was decided without reference to *Pillai's*⁽⁴⁾ and the Singapore case.⁽⁵⁾

With respect, the legal position here is the same as it would have been in India if the minority view at page 638 of *Shah J. in Moti Ram v. N.E. Frontier Railway*⁽⁶⁾ had been accepted by the Indian Supreme Court. This is what he said:

"(131). The argument that on being appointed to a public service, the employee acquires right to continue in employment, proceeds upon a misconception of the nature of appointment to a public post. Appointment to a public post is always subject to the pleasure being restricted in the manner provided by the Constitution. A person appointed substantively to a post does not acquire a right to hold the post till he dies, he acquires thereby merely a right to hold the post subject to the rules, i.e., so long as under the rules the employment is not terminated. If the employment is validly terminated, the right to hold the post is determined even apart from the exercise of the pleasure of the President or the Governor. There is in truth no permanent appointment of a public servant under the Union or the State. Nor is the appointment to a public post during good behaviour, i.e., a public servant cannot claim to continue in office so long as he is of good behaviour. Such a concept of the tenure of a public servant's office is inconsistent with Arts. 309 and 310 of the Constitution."

I am of the opinion that the cardinal principle obtaining here during British rule lasting about 125 years that a public servant holds office at the pleasure of the Crown, is an important principle that should not be whittled away in the absence of express statutory words whittling it, for as stated by Sproule J. in *Pillai's* case⁽⁴⁾ government employment being for the good of the public, it must not continue when it is no longer for the public good; it is essential for the public good that the Crown should not be hampered in dismissing a servant whose continuance in office it deems detrimental to the best interests of the State and its good government, by any fear of suits in reprisal; indeed such continuance in office may be a danger to the community. The only amendment I would make to the above observation is that in the light of our Constitution, these days dismissal must comply with article 135.

In the light of *Munusamy's* case,⁽⁷⁾ a decision of the Privy Council, it is common ground that if the purported termination of the plaintiff's service involved punishing or penalising the plaintiff, then it would amount to dismissal within the scope of article 135(2).

Lionel's case,⁽³⁾ a recent Privy Council decision, lays down quite clearly that in Malaysia too, as in England, there is a clear distinction between dismissal and mere termination of service. There the plaintiff could have been dismissed only by the Public Services Commission, but his service was terminated not by the P.S.C., but simply by the Johore C.P.O. purporting to act under regulation 36 of the Cap D then in force (gazetted as L.N. 432 of 1956). The plaintiff argued that in fact he had been dismissed and as he had been dismissed by the wrong authority his dismissal was void. The Government on the other hand argued that he had not been dismissed but only had his service terminated, which could validly be done by the C.P.O. The Privy Council agreed with the Government. After examining regulation 6 of Cap A and regulations 33, 36 and 48 of Cap D, Viscount Dilhorne giving the advice of Their Lordships said at page 5:

"Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the laws of Malaysia a similar distinction between dismissal and termination of services [also] appears to exist..."

Accordingly Their Lordships advised that the purported termination of Lionel's service was simple termination, not dismissal, and that therefore the C.P.O.'s decision was lawful.

The Cap D with which we are concerned also maintains a distinction between dismissal and termination of service. For instance, regulations 27, 29, 30, 32, 33, 34, 35 and 36 refer to dismissal. Regulation 44 under which Government purported to terminate the plaintiff's service, on the other hand, refers four times solely and simply to termination of service.

It seems to me that this distinction as regards public servants is somewhat blurred in India because the Indian constitutional provision corresponding to our article 135(2) uses the word "dismissal" and another word "removal" which does not appear in ours.

The plaintiff contends that anybody reading (a) the letter A7 which, as its heading showed, emanated from the Promotion and Discipline Section of the Public Service Commission and referred to the Government having decided to retire the plaintiff in the national interest, and (b) the letter A20 which stated that the plaintiff's pension benefit had been reduced by 10%, would think that somehow the plaintiff had left the service under a cloud, that this cast a stigma on him, that the Government meant to punish him, that the purported termination was in law dismissal and that on the authority of *Munusamy v. P.S.C.*⁽⁷⁾ he should have been given a reasonable opportunity of being heard under article 135(2). With all due respect, considering that pensions are only an eligibility and not a right and indeed may be withheld altogether, and considering that the letter expressly stated that the plaintiff could take all leave due to him and would also get a pension, I do not think that any one reading

the two letters (which give no reason why the plaintiff's service was terminated) would necessarily conclude that the plaintiff had been punished. With respect I would agree that the law is as stated by Ray J. (as he then was) when he said at page 2156 in *State of U.P. v. Shyam Lal*:⁽⁶⁾

"Where the authorities can make an order of compulsory retirement for any reason and no reason is mentioned in the order it cannot be predicated that the order of compulsory retirement has an inherent stigma in the order."

As already stated, the letter A7 refers to the plaintiff having been retired in the public interest under section 10(d) of the Pensions Ordinance, 1951. If one looks at that section, one will find that public servants who retire at age 55 with a pension (as most of them do) are required to retire under paragraph (a) of that section. Similarly the Yang Dipertuan Agung may require the following to retire under that section:

- (1) certain police and prison officers and certain male nurses on reaching age 45 (under paragraph (b));
- (2) officers suffering from infirmity of mind or body (under paragraph (c));
- (3) a woman officer who marries (under paragraph (e));
- (4) an officer whose office has been abolished (under paragraph (f));
- (5) any officer as a result of reorganisation (under paragraph (g)); and
- (6) any officer in the national interest (under paragraph (h)).

Nobody in his right mind would say that such officers, if and when called upon to retire, have left the service under a cloud, and that they have been dismissed though it is true that they have been removed from office; but removal from office is not necessarily dismissal. The plaintiff had his service terminated under paragraph (d) of the same section 10 and I do not think that it can be said that there was any stigma attached to his departure from government service. Therefore I would rule, respectfully disagreeing with the learned trial judge, that the plaintiff, though removed from office, had not been dismissed.

I now turn to other arguments advanced before us on the plaintiff's behalf.

It is argued that clause (6) of article 150 saves only laws, but not acts meaning decisions, inconsistent with the Constitution; that even if regulation 44 applied, the Government's act here was unlawful because the plaintiff had a right to appeal to the Board established by the Public Services Disciplinary Board Regulations, 1967, published as P.U. 292 on July 1, 1967, which had not been superseded by the Cap. D in question; that the plaintiff wrote the letter dated April 3, 1970, and Government did not reply to that letter thereby implying that it had denied the plaintiff his right of appeal. If this had been a genuine complaint, the plaintiff should have pleaded it, so as to give Government a chance to produce evidence to rebut the allegation; he did not do it and I think that it is too late for him to raise it before me.

It is argued that there should be read into regulation 44 a requirement that before an officer's service

is terminated he should be given a reasonable opportunity of being heard. It is said that this is required by the very language of that regulation. I agree, but only where Government acts under sub-regulation (2) of that regulation, which was not the case here. Where Government does not act under that sub-regulation, there is no need to give an officer a hearing.

It is argued that regulation 44 being made by the Director of Operations is invalid if inconsistent with the Constitution, because clause (6) of article 150 which reads:

"(6). Subject to Clause (6A), no provision of any Ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution. . . ."

allows only the Yang Dipertuan Agung and Parliament to make laws inconsistent with the Constitution, but not the Director of Operations. With all due respect, I do not think there is any merit in this argument, for the simple reason that in my judgment regulation 44 is not inconsistent with Constitution where the cardinal principle stated is that a public servant holds office at pleasure.

It is argued that the Yang Dipertuan Agung may delegate only *part* of his power (see *Eng Keock Cheng*⁽⁹⁾); that by subsection (1) of section 2 of the Emergency (Essential Powers) Ordinance No. 2 of 1969 published as P.U.(A) 149 on May 17, 1969, His Majesty purported to delegate *all* his power to the Director of Operations; that this purported delegation amounts to an abdication of His Majesty's power and is invalid, and accordingly regulation 44 made by the Director of Operations in purported exercise of power delegated to him, is void. With all due respect, I do not think there is any merit in this argument. If His Majesty may delegate part of his power he may delegate all of it, and there is no question of abdication in the instant case: after promulgating Ordinance No. 2 of 1969 His Majesty remained Yang Dipertuan Agung, still retained such power as he might have wished to exercise, and indeed has since then by P.U.(A) 62/71, section 3, in exercise of his royal power repealed that Ordinance.

It is argued that as the report on the plaintiff's conduct and work was dated January 3, 1970, when he had been with the Special Commissioners of Income Tax only one month and three days, it could not have been written by his then head of department; that it must have been written by his former head of department, the Secretary to the Ministry of Justice; that therefore the Government could not have terminated his service on the basis of that report, because regulation 44, sub-regulation (1), required that such a report should have been called by Government from the head of department "in which the officer is serving"; and as Government did terminate the plaintiff's service on the basis of that report, the said termination was unlawful. With all due respect, I do not think that there is any merit in this argument. In my judgment the word "is" should be read to mean "is or has been", as otherwise Government would be powerless to terminate the service of an officer such as the plain-

tiff who has recently been transferred to another department. The cardinal principle being that a public servant holds office at the pleasure of the Crown, the courts should not fetter the undoubted discretion of the Crown to terminate the service of the public servant.

To sum up, I am of the opinion that a pensionable public officer has no right, no lien, no title to his post; that regulation 44 is perfectly valid, that Government had power to terminate the plaintiff's service in the public interest under that regulation, that Government's decision to do so did not involve punishing or penalising him, that accordingly he had not been dismissed and that therefore he was not entitled to a reasonable opportunity of being heard under article 235 (2). The plaintiff's claim should have been dismissed. I would therefore allow this appeal. The plaintiff to pay costs here and below. The defendant's deposit to be returned to Government.

Lee Hun Hoe C.J. (Borneo): I have the advantage of reading the judgment of the Honourable the Lord President with which I concur. I wish, however, to add a few words.

The main question in this appeal is whether the learned judge was right to say that the termination of respondent's services amounted to a dismissal. He relied completely on Indian authorities and held, with respect, wrongly that respondent had a right to his post and that the letter of termination (A8) cast a stigma on respondent. Suffice to say that the Lord President has explained lucidly that in Malaysia a public servant does not have a right to a post and that (A8) in no way cast any stigma on respondent. If termination involves punishment, then it would amount to dismissal. This is not only the position in India but also in Malaysia. If a public servant has a right to a post, then the mere termination of his services would be regarded as a punishment. Where, however, there is no such right, as in this case, then the termination does not deprive him of any right and cannot, by any stretch of the imagination, be regarded as a punishment. Consequently, the termination cannot be said to amount to a dismissal within the meaning of Article 135(2) of our Constitution and the question of reasonable opportunity to be heard does not arise.

That the position in Malaysia is different from that of India has been stated quite clearly in a number of local cases. See *Munusamy v. Public Services Commission*,⁽⁷⁾ *Haji Ariffin v. Government of Malaysia*⁽¹⁾ and *Government of Malaysia v. Lionel*.⁽³⁾ Thomson, then Lord President, expressed in no uncertain terms in *Munusamy's case*⁽¹⁰⁾ that he could not agree that "the views of the Supreme Court of India regarding the effect of Article 311(2) of the Indian Constitution are very much in point in arriving at a correct interpretation of Article 135(2) of our Constitution." In *Ariffin's case*⁽¹⁾ Suffian F.J., as he then was, discussed about the pleasure rule. He has now gone even deeper into this question to show that the pleasure rule has not changed since Merdeka. *Munusamy's case* went to the Privy Council⁽⁷⁾ where their Lordships held that "dismissed" in Article 135(2) reflected an element of punishment. The words "dismissed or reduced in rank

or suffered any other disciplinary measure" in Article 135(3) seem to strengthen their Lordships' view that the right to be heard only arises in the case of "dismissal" involving disciplinary offences. After referring to Article 311 of the Indian Constitution and Indian cases, particularly *Dhingra's case*⁽¹¹⁾ Lord Hodson concluded with these words:—

B "The Indian Constitution contains no provision corresponding to Article 135(3) of the Malaysian Constitution which, as has been already stated, strengthens the view that 'dismiss' relates to disciplinary action."

In reply to the letter (B2) from respondent's solicitors the Attorney-General stated (B4) that disciplinary action was not taken against respondent but he had been pensioned off in the public interest under section 10(d) of the Pensions Ordinance, 1951 and pursuant to Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969. Further, the Attorney-General made clear that the report was privileged and could not, therefore, be supplied to respondent. That the report was privileged was, in fact, conceded by respondent.

In Malaysia a public servant is not guaranteed a security of tenure. In other words he has no right to a post. In the case of *Government of Malaysia v. Lionel*⁽³⁾ Viscount Dilhorne, delivering the judgment of the Board, after discussing Articles 135 and 144 of our Constitution stated:—

E "So under the provisions of the Constitution, members of the general public service obtained a degree of security of tenure of their appointments. In their Lordships' view it is not correct to say, as Ong, C.J. said in the course of his judgment, that they were guaranteed security of tenure under Part X of the Constitution."

He went on to say later:—

F "Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the laws of Malaysia a similar distinction between dismissal and termination of services appears to exist...."

I do not have to repeat the provisions of Regulation 44 as these have been set out *in extenso* by the Lord President in his judgment. It was contended that "full report" indicated completeness and it could not be so unless respondent was given a reasonable opportunity to say something otherwise it would infringe the rule of natural justice. In particular, if the report was adverse to respondent he should be told of it. This is so only if the Government requires further clarification. See Regulation 44(2). But, where it is clear and unambiguous and, having regard to various factors the Government is satisfied that it is desirable in the public interest the Government may terminate respondent's services without much ado. So long as the Government acted in good faith in considering the report it must be presumed that the Government was satisfied that it was indeed in the public interest to terminate respondent's services. The court cannot go behind the report. The procedure, being administrative, rather than judicial the approach has to be on broad lines and cannot be compared with judicial methods and procedure. See *Local Government Board v. Arlidge*,⁽¹²⁾ *Ridge v. Baldwin & Ors.*,⁽¹³⁾ and *Maxwell v. Department of Trade and Industry*.⁽¹⁴⁾ Where there is an allegation of breach of natural justice the

court must be concerned with the substance and reality of the situation.

"I always find the expression 'natural justice' very difficult." said Lord Parker, C.J. in *R. v. Registrar of Building Societies* [1960] 1 W.L.R. @ 676. "There is no one code of natural justice which is automatically imported into any procedure of judicial nature. What is imported by way of natural justice depends entirely on the tribunal or official in question, the nature of his functions, and, perhaps most important of all, the exact words of the statute, because Parliament may by suitable words, provide for a procedure which conflicts in many respects with the concepts of natural justice which one would find adopted by the courts. Each case must depend upon the nature of the function and the exact words of the statute."

There is nothing in the pleading to suggest that the Government has acted *mala fide*. So, respondent cannot now be heard to say that Government has acted *mala fide*. Since the Government has acted in good faith that would be the end of the matter. On this aspect the learned judge stated the position correctly at page 68 of the Appeal Record:—

"Now Regulation 44 of the 1969 Regulations says that Government has the absolute right to terminate the service of a Government servant if it is satisfied that it is in the public interest to do so. If the Government, *bona fide*, forms that opinion, why and how it formed that opinion and whether that opinion is correct are matters which are not the concern of the court."

There is one matter I would particularly like to touch on, that is, the contention of respondent that the Yang Dipertuan Agung cannot delegate his powers under the Constitution. Normally, the power to legislate rests with the Yang Dipertuan Agung (His Majesty) and the two Houses of Parliament, namely, the Dewan Negara (The Senate) and the Dewan Ra'ayat (The House of Representatives). See Article 44 of the Constitution. But, where as a result of a national crisis an emergency is declared and Parliament is not sitting then the entire power falls on His Majesty. Article 150 makes provisions for such a situation. His Majesty is dutybound to summon Parliament as soon as practicable. As a result of what is now commonly known as the "May 13" incident, His Majesty, in the exercise of the power under the said Article issued a Proclamation of Emergency on May 15, 1969 in order to safeguard the security and economic life of the nation. Because of the plural society in Malaysia the framers of the Constitution, in their wisdom and with foresight, had inserted the said Article giving His Majesty absolute power to deal with such a situation. Article 150 reads:—

"150. (1) If the Yang Dipertuan Agung is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang Dipertuan Agung shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate Ordinances having the force of law, if satisfied that immediate action is required.

(3) A Proclamation of Emergency and any Ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or Ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang Dipertuan Agung to issue a new Proclamation under Clause (1) or promulgate any Ordinance under Clause (2).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding any-

thing in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State, or to any officer or authority thereof.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution or in the Constitution of the State of Sarawak, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang Dipertuan Agung for his assent.

(6) Subject to Clause (6A), no provision of any Ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution or of the Constitution of the State of Sarawak.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays, or with respect to any matter of native law or custom in a Borneo State; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any Ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period."

In such a national crisis the individuals must suffer some restrictions in the interest of the nation as a whole. The Ordinances promulgated under Article 150(2) would be as valid and binding as those made by Parliament. To prevent any doubt, Article 150(6) makes clear that any inconsistency between the Ordinances so promulgated and the Constitution the former shall not be declared to be invalid.

On the same day that the said Proclamation was issued, His Majesty, pursuant to Article 150(2) promulgated the Emergency (Essential Powers) Ordinance, No. 1 of 1969 (P.U.(A) 146/69) which empowered him to make essential regulations and which also continued in force the Essential Regulations made under Emergency (Essential Powers) Act, 1964. With commendable wisdom His Majesty acted in accordance with the spirit of the Constitution at a time of extreme national danger. On the following day His Majesty promulgated another Ordinance, that is Emergency (Essential Powers) Ordinance No. 2 of 1969 (P.U.(A) 149/69) under which a Director of Operations was appointed. By section 8 of Ordinance No. 2 of 1969 the said Director was empowered to make Essential Regulations under section 2 of Ordinance No. 1 of 1969. Ordinance No. 2 of 1969 provides for the delegation of executive authority of Malaysia and all the powers and authorities concerned on His Majesty by any written law to the Director. This enabled the Director to make regulations to ensure the effective control of security, defence, maintenance of public order and supplies and services essential to the life of the community. Consequently, until Parliament could be summoned the Director could exercise all executive and

legislative powers in Malaysia and in exercising such powers he was not subject to control by Parliament. The only control was that he must act in accordance with the advice of the Prime Minister. Some regulations were thus made by the Director. One of these was the Essential (General Orders, Chapter D) Regulations, 1969 (P.U.(A) 273/69) and in its Schedule the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations 1969 were listed and to be applied during the Emergency. Sections 2 and 3 of the Essential (General Orders, Chapter D) Regulations 1969 make the position clear and read:—

"2. For so long as the state of Emergency continues to be in force the provisions of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1968 shall be suspended and the provisions of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations 1969 as set out in the Schedule hereto shall have effect in place thereof.

3. For so long as the state of Emergency continues to be in force the disciplinary procedures provided in the General Orders set out in the Schedule hereto shall apply to any breach or contravention of any provision of the Public Officers (Conduct and Discipline) Regulations, 1956 or the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations 1968 as they apply to any breach or contravention of any provision of the General Orders as set out in the Schedule hereto."

This was not the first occasion when recourse was had to the provisions of Article 150. A Proclamation of Emergency existed in the Federation of Malaya for some twelve years when the Government had to deal with communist insurgency. During this period two national elections had taken place. The second occasion arose in 1964 after the formation of Malaysia when a Proclamation of Emergency was issued as a result of Indonesian Confrontation. During both these occasions the State legislatures and Governments continued to function and Parliament sat whenever summoned. Parliament promulgated the Emergency (Essential Powers) Act, 1964. Under this Act His Majesty was conferred with wide powers to make such regulations as he considered necessary to secure public safety, the defence of the nation and the maintenance of public order and of supplies and services essential to the life of the community. The Emergency (Criminal Trials) Regulations, 1964 was enacted. The validity of the said regulations was challenged in the case of *Eng Keock Cheng v. Public Prosecutor*.⁽⁹⁾ One of the contentions was that the 1964 Act was couched in so wide terms that the 1964 Act amounted to abrogation by Parliament of its powers to legislate. This contention was rejected by the Federal Court.

The third occasion a Proclamation of Emergency was issued by His Majesty was in 1966 as a result of a grave political crisis in Sarawak threatening the security of the State. The validity of the Proclamation was challenged in the case of *Stephen Kalong Ningkan v. The Government of Malaysia*.⁽¹⁵⁾ The Privy Council held the Proclamation to be *intra vires* and valid and considered that the continuing existence of earlier Emergency Proclamations or Acts (whether under Article 149 or Article 150 of the Federal Constitution) could not in the circumstances justify a different conclusion. The emergency, the subject of the appeal, was distinct in fact and kind from those that preceded it and the powers conferred by Article 150 were in being and not spent when it arose.

A The emergency in 1969 is different from the previous emergencies in that when the Proclamation was made, Parliament had already been dissolved and elections to Dewan Ra'ayat had yet to be completed. As it was not possible to summon Parliament, the Proclamation could not be laid before Parliament. In such a situation, legislation could only be promulgated by His Majesty. Some Ordinances were promulgated. B Two of them have been mentioned. The third one is Emergency (Essential Powers) No. 3 Ordinance, 1969 (P.U.(A) 170/69) which provides for modifications to the Eighth Schedule in relation to State Constitutions. It also removes provisions of section 2 of Ordinance No. 1 of 1969 relating to citizenship; provisions which C because of Article 150(6A) would appear to be *ultra vires* the powers of the Yang Dipertuan Agung. Further, it specifies that, notwithstanding, Article 55, the Yang Dipertuan Agung may summon Parliament to meet on a date to be determined by him. Ordinance No. 3 of 1969 was repealed by P.U.(A) 64/71.

D What then is the effect of Article 150? The answer was given by Wylie, then C.J. (Borneo) in *Eng Keock Cheng v. Public Prosecutor*⁽⁹⁾ in a passage which reads:—

"The true effect of article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution."

E Under Ordinance No. 2 of 1969 His Majesty may delegate all his powers and authorities to the Director of Operations. Respondent contended that His Majesty could only delegate part of his power but not all. Delegating all his powers would amount to abdication and would be invalid. Therefore, Regulation 44 F made by the Director of Operations by virtue of such delegation would be void. The learned judge dealt with the question of validity of Ordinance No. 2 of 1969 at some length and with great care. He considered various authorities cited to him and came, with respect, to the right conclusion when he said at page G 148 of the Appeal Record:—

"I am of the view that the Essential (General Orders, Chapter D) Regulations, 1969 are valid and not *ultra vires* either the Constitution or Ordinance No. 1 of 1969."

H I agree with the Lord President that if His Majesty could delegate part of his power he could delegate all and this could not amount to abdication because he still retained certain constitutional powers which he alone could exercise. In any event, Ordinance No. 2 of 1969 was enacted pursuant to Article 150 and clause (6) of that Article expressly provides for legislation that may override the provisions of the Constitution. The result is that in the case of any legislation enacted under a power which gave it validity I notwithstanding inconsistency with the Constitution it would be otiose to consider whether such legislation would be inconsistent with any provision of the Constitution.

In an emergency the situation not being normal extraordinary measures may have to be adopted. In such a situation the nation comes first and there is nothing to prevent His Majesty from delegating all his

powers both executive and legislative to some other authority. He chose to give such powers to the Director of Operations, who incidentally, happened to be our Deputy Prime Minister. It was a manifest necessity of the time. It would be futile to argue that the delegation of powers by His Majesty or, for that matter, Parliament would be against the Constitution. The short answer to such an argument is provided by Article 150(6). The wide power given to the Director of Operations lasted as long as the emergency existed. It was temporary in nature. It ceased to exist once Parliament annulled the Proclamation. In my opinion, it is not beyond the power of His Majesty or Parliament to enact Ordinances No. 1 of 1969 and No. 2 of 1969 and other such Ordinances.

It is the emergency legislation that we are dealing with. The seriousness of the situation which threatened to destroy the unity of the nation should not be overlooked. Even though elections to the Dewan Ra'ayat had not been completed it would seem possible to summon Dewan Ra'ayat and Dewan Negara for under Article 62(2) each House might act notwithstanding any vacancy in its membership. The amendment made by Emergency (Essential Powers) Ordinance No. 3 of 1969 (P.U.(A) 170/69) empowers His Majesty to summon Parliament on a date to be determined by him. But, summoning of Parliament was not the answer to meet such an extraordinary situation which demanded extraordinary measures. In the present emergency, His Majesty alone could decide what was best for the nation. The situation called for prompt and speedy action to restore law and order. Events had proved that the Director of Operations had acted fairly, honestly and with moderation to bring the situation back to normal. Article 150 gives His Majesty wide powers, so wide that he could in the interest of the nation during an emergency act as he thought fit. This is a most important aspect of the matter. The interest of the nation comes first. This is the law of civil or state necessity which forms part of the common law and which every written constitution of all civilised states takes for granted. The reason underlying the law of necessity was aptly put by Cromwell that "if nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make law." In *Ronnfeldt v. Phillips & Ors.*⁽¹⁶⁾ Scrutton L.J. observed:—

"In time of war there must be some modifications in the interests of the State. It had been said that war could not be conducted on the principles of the Sermon of the Mount. It might also be said that a war could not be carried on according to the principles of Magna Charta."

It is part of the democratic process, even during national emergency for the court to be vigilant that emergency expedients do not exceed the real necessities of the situation. In an emergency the Crown could use a subject's property in defence of the realm without compensation. *Attorney-General v. De Keyser's Royal Hotel Ltd.*⁽¹⁷⁾ In time of war and out of military necessity the King could take a subject's property. This is part of the common law. See *Saltpetre's case*,⁽¹⁸⁾ *Shipmoney's Case*, *R. v. Hampden*.⁽¹⁹⁾

In the *Prerogatives of the Crown*, 1820 Edition, page 68 Chitty said that:—

A "The King is the first person in the nation — being superior to both Houses in dignity and the only branch of the Legislature that has a separate existence, and is capable of performing any act at a time when Parliament is not in being."

B In *re An Arbitration between Shipton, Anderson & Co. and Harrison Brothers & Co.*⁽²⁰⁾ certain quantity of wheat was requisitioned by the Government under an Act. It was held that as the delivery of wheat by the seller to the buyer was rendered impossible the seller was excused from the performance of the contract. Darling J. remarked in that case:—

C "It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. *Salus populi suprema lex* is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."

D All acts done by His Majesty and by the Director of Operations in an emergency were dictated by necessity and so long as they were done in good faith the courts could not question them for the simple reason that in an emergency state necessity and interest were of paramount importance over individual rights.

I would allow the appeal with costs here and in the court below.

E **Ong Hock Sim F.J.:** I have had the advantage of reading the judgments in draft of my Lord President and the learned Chief Justice, Borneo and agree with them that this appeal be allowed. An exhaustive examination of the law respecting dismissal and termination of service has been made by the Lord President and I would only express my full concurrence with his conclusions thereon. I would like to add, as briefly as I can, my own views why I am of the opinion that the learned trial judge erred, despite certain conclusions reached by him, in deciding in favour of the respondent, particularly, as the subject matter of this appeal has far-reaching effects and involves construction of the Constitution.

G The Notes of Evidence, so far as oral testimony is concerned, took up no more than four pages of the Record, with the rest devoted to legal arguments (pages 19-49). The facts are set out in the judgment of the Lord President. On pain of being repetitious, I would refer to the Amended Statement of Claim dated September 20, 1973, relevant portions of which, summarised, I now set out:—

H "2. By a letter dated 20 March 1970 ... the Ketua Pengarah Perkhidmatan Awam Malaysia ... notified the plaintiff that his services were being terminated under section 10(d) of the *Pensions Ordinance, 1951* and that the plaintiff was required to retire in accordance with paragraph 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter 'D') Regulations 1969.

I 4. ... on 2 April 1970 the plaintiff wrote ... protesting, *inter alia*, that he had been condemned unheard but the plaintiff was neither given an opportunity to defend himself nor told ... why his services were being terminated.

4A. The plaintiff contends that Regulation 44 ... is null and void and *ultra vires* the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution." (Italics supplied).

The Amended Amended Statement of Defence is equally brief and I quote the relevant portions:—

"3. The defendant ... avers that the termination of the plaintiff's employment is lawful and proper and in accordance

with the Regulation 44 ... and he was lawfully retired under section 10(d) of the Pensions Ordinance, 1951.

4. The defendant avers that the exercise of ... its rights to terminate ... is not an act of dismissal or reduction in rank within the meaning of Article 135(1) and (2) ... and ... not therefore necessary ... to give the plaintiff a reasonable opportunity of being heard.

4A. The defendant ... avers that Regulation 44 ... is *intra vires* the provisions of Ordinance No. 1 of 1969 and Article 150 ... and further avers that the services ... was (sic) properly terminated under the said Regulation 44." (Italics supplied).

In the light of the pleadings and having regard to the Notes of Evidence recorded, it would have been thought that the issues were straightforward and simple. In a somewhat lengthy judgment, the learned judge decided in favour of the plaintiff. With respect, I am of opinion that the learned judge had permitted himself to fall into the error of leaning too heavily upon certain Indian authorities, which might be quite correct for an interpretation of Article 311 of the Indian Constitution. Our Article 135 of the Constitution has not the word "removed". The learned trial judge went on to observe:—

"Article 135 of our Constitution is in *pari materia* with Article 311 of the Indian Constitution.... The words 'dismissed', 'removed' and 'reduced in rank' were used in India ... as words signifying or denoting three major punishments which could be inflicted on government servants."

As the Lord President said, on the distinction between "dismissal" and "termination of services:—

"It seems to me that this distinction as regards public servants is somewhat blurred in India because the Indian constitutional provision corresponding to our Article 135(2) uses the word 'dismissal' and another word 'removal' which does not appear in ours."

It seems reasonably clear that the words used bore a different meaning and I would respectfully disagree with the trial judge in *Thambipillai v. The Government of Malaysia*⁽²¹⁾ where he said:—

"The former two words corresponding in meaning to the word 'dismissal' in our Article 135(2)."

That seems tantamount to saying that the use of the two words in Article 311 merely resulted in a distinction without a difference. As the trial judge said "Removal is only a species of dismissal. It, like dismissal, brings about a termination of service. As far as re-employment is concerned the effect of Regulations and of Chapter 'A' of the General Orders is the same on a person dismissed from service as on a person whose services are terminated."

In *Government of Malaysia v. Lionel*,⁽³⁾ Viscount Dilhorne said in regard to Article 135:—

"So under the provisions of the Constitution, members of the general public service obtained a degree of security of tenure of their appointments. In their Lordships' view it is not correct to say, as Ong, C.J. said in the course of his judgment, that they were guaranteed security of tenure under Part X of the Constitution. Although they hold their offices at the pleasure of the Yang Dipertuan Agung, only the Public Services Commission, or an officer or officers to whom the Commission had validly delegated its functions, could exercise disciplinary control and they cannot be dismissed or reduced in rank save by a person who could appoint a member of the service of equal rank and without an opportunity of being heard. Regulation 6 of the General Orders Chapter A reads as follows:—

'An officer who has been dismissed from the service or whose services have been terminated on the grounds of unsatisfactory work or conduct may only be re-employed in special and exceptional circumstances.'

A A distinction is thus drawn between dismissal and termination of services. This Regulation is in that part of the General Orders dealing with appointments and in their Lordships' view was not intended to be and is not a penalty imposed by a Disciplinary Authority on dismissal or by the person who terminates an appointment."

With respect therefore to the trial judge, I do not agree that the termination constitutes a dismissal.

B The termination of services under Regulation 44 is not in that part of the General Orders of Chapter D governing Disciplinary proceedings and is not one of the forms of punishment set out in Regulation 36. As the judge himself said "It is worthy of note that the major punishment referred to in the Public Officers (Conduct & Discipline) (General Orders, Chapter 'D') Regulations, 1969 ... do not make any reference to 'removal' as a form of punishment."

C As I have said, the simple issue raised by paragraph 4A of the Amended Statement of Claim is whether Regulation 44 of the 1969 Regulations is null and void and *ultra vires* the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution. The trial judge observed:—

"... *Prima facie*, the act of the Government in requiring the plaintiff to retire from service seems quite valid.... It is quite clear that if use was to be made of section 10(d) of the Pensions Ordinance in respect of the plaintiff, his services had first to be terminated and it was for that reason that Regulation 44 of 1969 Regulations was expressly referred to in A8, which again brings us to the basic question of the validity of termination of the plaintiff's services and the validity of the Regulation itself."

As he further said:—

"The 1969 Regulations were a piece of legislation necessitated by the emergency.... There does not, however, seem to be, in England anything like the 1969 Regulations.... Article 4 of the Constitution declares that the Constitution shall be the supreme law of the country. Article 150(6) makes safe the validity of our Ordinance promulgated by the Yang Dipertuan Agung under Article 150. It says 'no provision of any Ordinance promulgated under this Article ... shall be invalid on the ground of inconsistency with any provision of the Constitution.' ... When the Constitution has been declared to be supreme nothing can override or abrogate its sovereign dictates, power and supremacy. Laws promulgated under Article 150 cannot be declared invalid.... A law made under Article 150(2) derives its force and validity from Article 150 itself and takes effect in accordance with its tenor and cannot be ... tested under Article 135 or any other provision of the Constitution.... On the strength of the authorities already referred to by me, I am of the view that the *Essential* (General Orders, Chapter 'D') Regulations, 1969 are valid and not *ultra vires* either the Constitution or Ordinance No. 1 of 1969." (Italics supplied).

H On this finding, clearly the claim should have been dismissed. With regard to paragraph 4, the right to be heard or to have an opportunity to defend himself can only arise if plaintiff had been dismissed or reduced in rank in the words of Article 135. I do not agree with the judge that the termination in this case pursuant to Regulation 44 is in fact a dismissal, notwithstanding, as he cynically observed, the "granting a pension out of its rich coffers", a privilege which is not accorded to a person dismissed. It is not disputed that no disciplinary proceedings were taken against him and therefore Regulations 28, 29 and 30 of the 1969 Regulations could not be applied against him. It is a little difficult to reconcile the statement of the learned judge where he said in one breath that "No doubt Article 135(2) had no application to the present case" and immediately after "the procedure

prescribed for dismissal under Part II of the 1969 Regulations should have been followed. The so-called termination was in fact a dismissal." Regulation 27 is specific when it said:—

"In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard." (Italics supplied).

The action pursuant to Regulation 44 is not within the ambit of Regulation 27.

I am in agreement with my brethren that Article 132(2A) preserves the doctrine of pleasure. "There seems no vested right in remaining in government service up to a certain age," as the judge himself remarked but which is what the plaintiff claimed he was entitled to. Unlike judges who "hold office until he attains the age of sixty-five years" and who "shall not be removed from office" except in accordance with the provisions of Article 125, a member of the public service under the pleasure doctrine occupies a different position. As long ago as 1927, in *S. K. Pillai v. State of Kedah*⁽⁴⁾ it was said:—

"Now a public servant on accepting an appointment under the British Crown is in general appointed for no defined period. The Crown does not bind itself either to retain his services or to grant him increased pay or promotion. But it is the custom to bring to his notice that he may expect, if he remains in service . . . ultimately on retirement (at an age that is not infrequently specified) a pension, . . . such an arrangement . . . confers no rights on the servant."

and in *Terrell v. The Secretary of State for the Colonies and Another*,⁽²²⁾ Lord Goddard L.C.J. said:—

"In my opinion it is clear that judges in the Straits Settlements, or Malaya . . . hold and always have held their office at the pleasure of the Crown. . . .

In strictness the claimant was appointed by Letters Patent . . . and I regard the correspondence merely as telling him of the age of compulsory retirement and of the pension at whatever age he retired that he might expect. I say 'expect' because under the Pensions Ordinance there is no absolute right to a pension.

Were I to accede to the argument that these letters amount to a contract, I should be holding, in effect, that every person entering the service of the Crown who is told before he enters that his retiring age will be so and so could say that he had a contractual right to remain in the service till that age, and this would in effect override all the cases which have decided that a servant of the Crown holds office at pleasure."

I agree that this appeal be allowed with costs here and in the court below.

Appeal allowed.

Solicitors: *Lim Kean Chye & Co.*

A TAY EK SENG COMPANY SDN. BHD. & ORS. v. TAY CHO KOH & ORS.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) May 9, 1975]

[Kuala Lumpur—Federal Court Civil Appeal No. 45 of 1974]

Practice and Procedure — Order — Variation of Order.

B The respondent had obtained an order under section 143(4)(b) of the Companies Act, 1965 directing the Chairman (2nd appellant) to call the 13th Annual General Meeting and the directors to call the 14th and 15th meetings within a prescribed period. When the respondents could not serve the order on the appellants they applied by motion for variation of the order to provide for the meetings to be called by the company. The learned judge allowed the application. The appellants appealed to the Federal Court.

C **Held**, dismissing the appeal: in this case the order had not been substantially altered so as to make it an entirely new order. If it had not been varied the whole purpose of the order would have been defeated.

Cases referred to:—

- (1) *Re Suffield and Watts, ex parte Brown* (1888) 20 Q.B.D. 693.
- (2) *Preston Banking Company v. William Allsup & Sons* [1895] 1 Ch. 141.

FEDERAL COURT.

A. L. Teye for the appellants.

Tharu Singh for the respondents.

E Ali F.J.: This is a dispute between the two directors (second and third appellants) of a private company (the first appellant) and seven of its members, one of whom (fourth respondent) is also a director.

F By Originating Summons No. 68 of 1973 the respondents applied for an order under section 143(4)(b) of the Companies Act, 1965 to call the 13th, 14th and 15th Annual General Meetings of the company. The 13th Meeting was held in February, 1971 but was adjourned to enable a committee of inspection to examine the annual accounts.

G The respondents have come to the court to get an order to call the adjourned meeting as well as the subsequent annual general meetings which should have been called but were not called. The late Pawan Ahmad J. made an order in terms of the Originating Summons directing the chairman (second appellant) to call the 13th Annual General Meeting and the directors to call the 14th and 15th meetings within a prescribed period. This was on October 8, 1972. When the parties could not agree on the terms of the draft order the respondents on November 27, 1972 filed a Motion to vary the order. The nature of the variation sought was to have the meetings called by the company (first appellant) and not by the directors or chairman as originally ordered. The reason for the Motion was because the respondents had anticipated that the order as it originally stood could not be carried out in the event it could not be served on either the chairman and/or other directors. The judge at first granted the Motion but subsequently recalled the order and reversed his decision by dismissing the Motion. The October 8 order thus remained unvaried. When the respondents could not serve it on the second and third appellants they brought another Notice of Motion to vary the order. In the meantime the three meetings had not been called as directed. Obviously something must be done to the original order to en-